UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LEWIS FOODS OF 42ND STREET, LLC, A McDONALD'S FRANCHISEE, AND McDONALD'S USA, LLC, JOINT EMPLOYERS, et al.	**Cases 02-CA-093893, et al.** **04-CA-125567, et al.** **13-CA-106490, et al.** **20-CA-132103, et al.**
and	**25-CA-114819, et al.** **31-CA-127447, et al.**
FAST FOOD WORKERS COMMITTEE AND SERVICE EMPLOYEES INTERNATIONAL UNION, CTW, CLC, et al.	

GENERAL COUNSEL'S OPPOSITION TO RESPONDENT McDONALD'S USA, LLC'S REQUEST FOR SPECIAL PERMISSION TO APEAL THE ADMINISTRATIVE LAW JUDGE'S CASE MANAGEMENT ORDER

For the fourth time, McDonald's USA, LLC ("McDonald's" or "Respondent") has filed a request for special permission to appeal, making clear its refusal to accept any decision the ALJ renders in this proceeding. This latest request ("Appeal") asks to appeal a decision squarely within the ALJ's discretion, the order of the presentation of evidence. National Labor Relations Board Rules and Regulations, Sec. 102.35(a)(6) ("The administrative law judge shall have authority…to regulate the course of the hearing"); see also *Dickens, Inc.*, 355 NLRB 255, 256 (2010); *Baddour, Inc.*, 281 NLRB 546, 546 n.2 (1986), enfd. 848 F.2d 193 (6th Cir. 1988), cert. denied 488 U.S. 944 (1988). Because the ALJ reasonably exercised her discretion in ordering the presentation of evidence and plainly explained the basis for her decision, Respondent's request should be denied.

McDonald's seeks to appeal the ALJ's March 3, 2015 case management order ("Order") because, it claims, the Order (1) is inconsistent with standard procedures in unfair labor practice

cases, (2) is not as efficient as its own proposal and (3) gives the General Counsel and Charging Parties an unspecified, but purportedly major and impermissible, litigation advantage. These claims are unsupported and illogical.

McDonald's first and second objections appear to envision excluding joint employer evidence until all unfair labor practice evidence has been heard and assert, incorrectly, that the procedure ordered by the Judge is inconsistent with traditional Board processes. Proceedings before the Board do not make a practice of deferring all "remedial issues" to the end of a case. For instance, when the General Counsel seeks a *Gissel* remedial bargaining order, he will often start his case by presenting testimony from a union representative, including evidence that a majority of the relevant employees authorized the union to serve as their collective bargaining representative. Such presentation of evidence is routinely accepted, even though the issue of majority support is relevant to whether a bargaining order is an appropriate remedy but not (generally) to whether the employer committed unfair labor practices warranting such a remedy. Certainly, the General Counsel in such a case does not need to await a finding or ruling by the ALJ that the employer committed the alleged unfair labor practices before presenting evidence on the question of whether employees supported the union prior to the violations.

Second, the number of allegations in this proceeding makes it all but certain the joint employer issue will be reached regardless of the order of presentation of evidence.[1] Thus, the only question is whether it is more efficient to hear the joint employer evidence earlier or later in the proceeding. McDonald's insists that the unfair labor practice allegations should be

[1]A preliminary merit determination has already been made by Regional Directors as to each of these allegations, which remain after investigations resulting in the dismissal or withdrawal of more than half of the initial allegations. See http://www.nlrb.gov/news-outreach/fact-sheets/mcdonalds-fact-sheet (last visited March 18, 2015). Further, the General Counsel has a high success rate in his prosecution of unfair labor practice allegations. See http://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1674/13682%20NLRB%202014%20PAR%20v5%20-%20508.pdf at p. 41. Thus, it is all but inescapable that the joint employer issue will be litigated for at least one franchisee in each of the three planned locations for this trial.

adjudicated first.[2] The ALJ rejected this approach because she concluded—as required by the foregoing facts—that McDonald's proposal would likely result in holding two hearings at each location. (Order at 3, n.2.) Since that conclusion and the corresponding decision to avoid requiring the parties to appear multiple times were both eminently reasonable and hence within the Judge's discretion, Respondent's argument fails.

McDonald's final assertion, that the Order grants the General Counsel and Charging Parties an unfair litigation advantage, is similarly flawed. First, McDonald's proposal—to have the General Counsel present evidence for every franchise before any of the Respondents present any evidence—entails conducting the hearing with respect to each franchisee twice.[3] Though McDonald's is apparently unconcerned about the burden that approach would place on the franchisees, the General Counsel, and the Charging Parties, the inefficiency inherent in it is plain, and the Administrative Law Judge was well within her discretion to reject it.

Second, the vast bulk of the evidence regarding the joint employer issue will be in the hands of McDonald's and applicable to all Respondent Franchisees. Because the Order gives Respondents the option to defer responding to that evidence until the General Counsel rests, Respondents can choose to reveal almost nothing about its defense to the General Counsel.

Finally, Respondent's motion to sever would have, if granted, given the General Counsel a complete picture of Respondent's defense to the joint employer allegation after the first

---

[2]McDonald's appears unconcerned about the burden its approach would place on its franchisees and focuses solely on the burden to McDonald's USA. The ALJ appropriately considered all the parties.

[3] In fact, if both of Respondent's proposed modifications of the Order were adopted, the parties would have to appear at each hearing location three times: first, the General Counsel would have to present unfair labor practice evidence for all facilities. Assuming that the General Counsel made out *prima facie* cases for at least one allegation for each of the twenty-one facilities and that Respondents were not required to present any evidence on any issue until the General Counsel rested his case in the entirety, all the parties would then have to conduct a second round of hearings at which joint employer evidence would be received. Following the conclusion of that stage of proceedings, Respondents would then have to present their answering cases. Even if the General Counsel failed to present a *prima facie* case for any unfair labor practice allegation with respect to one or two facilities, the vast majority of the franchises and McDonald's would still be involved in the case through three stages, an approach that is plainly not efficient or reasonable.

proceeding and allowed the General Counsel to use that information in all subsequent proceedings. That strongly suggests that Respondent's alleged due process concerns are greatly exaggerated. Further, by allowing Respondent McDonald's to postpone its defense to the joint employer issue until the end of trial, the Order gives the General Counsel the most restricted view of the Respondent's joint employer defense compatible with any reasonably efficient process.

For the foregoing reasons, Respondent's request for permission to appeal Judge Esposito's Case Management Order should be denied.

Dated: New York, New York
March 27, 2015

/s/ David Gribben
David Gribben, Counsel for the General Counsel

GENERAL COUNSEL'S OPPOSITION TO RESPONDENT McDONALD'S USA, LLC'S REQUEST FOR SPECIAL PERMISSION TO APEAL THE ADMINISTRATIVE LAW JUDGE'S CASE MANAGEMENT ORDER

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on March 27, 2015, I electronically filed the above-entitled document(s) with the National Labor Relations Board and served the above-entitled document(s) upon counsel for the parties by electronic mail at the following addresses:

Mary Joyce Carlson, Esq.
1100 New York Ave., NW, Suite 500 West
Washington, DC 20005
carlsonmjj@yahoo.com

Doreen S. Davis, Esq.
Willis J. Goldsmith, Esq.
Sharon Cohen, Esq.
Matthew Lampe, Esq.
Joshua Grossman, Esq.
Jones Day
222 E. 41st St.
New York, NY 10017-6739
ddavis@jonesday.com
wgoldsmith@jonesday.com
sharoncohen@jonesday.com
mwlampe@jonesday.com
jgrossman@jonesday.com

Caralyn M. Olie, Esq.
Terrill Pierce, Esq.
Brian J. Sharpe, Esq.
Susan M. Troester, Esq.
Gina M. LiVolsi, Esq.
Martin K. LaPointe, Esq.
LaPointe Law, P.C.
1200 Shermer Rd., Suite 310
Northbrook, IL 60062-4500
bsharpe@lapointelaw.net
colie@lapointelaw.net
stroester@lapointelaw.net
glivolsi@lapointelaw.net
tpierce@lapointelaw.net
mlapointe@lapointelaw.net

Barry M. Bennett, Esq.
George A. Luscombe, III, Esq.
Dowd, Bloch, Bennett & Cervone
8 S. Michigan Ave., 19th Floor
Chicago, IL 60603-3315
bbennett@dbb-law.com
gluscombe@dbb-law.com

Robert Brody, Esq.
Abby Warren, Esq.
Brody and Associates, LLC
179 Post Rd. West
Westport, CT 06880-4602
rbrody@brodyandassociates.com
awarren@brodyandassociates.com

Gwynne Wilcox, Esq.
Micah Wissinger, Esq.
David Slutsky, Esq.
Angelica Cesario, Esq.
Levy Ratner, P.C.
80 Eighth Ave., Eighth Floor
New York, NY 10011-7175
gwilcox@levyratner.com
mwissinger@levyratner.com
dslutsky@levyratner.com
acesario@levyratner.com

Matthew Egan, Esq.
Pretzel & Stouffer
One S. Wacker Dr., Suite 2500
Chicago, IL 60606-4708
megan@pretzel-stouffer.com

Brian W. Easley, Esq.
Michael S. Ferrell, Esq.
Jonathan M. Linas, Esq
Andrew G. Madsen, Esq.
Jones Day
77 W. Wacker Dr., Suite 3500
Chicago, IL 60601-1701
jlinas@jonesday.com
mferrell@jonesday.com
beasley@jonesday.com
amadsen@jonesday.com

Claude Schoenberg, Esq.
Schoenberg Law Office
Two Bala Plaza, Suite 300
Bala Cynwyd, PA 19004
claude.schoenberg@me.com

Craig R. Annunziata, Esq.
Steve A. Miller, Esq.
James M. Hux, Jr., Esq.
Fisher & Phillips LLP
10 S. Wacker Dr., Suite 3450
Chicago, IL 60606-7592
cannunziata@laborlawyers.com
smiller@laborlawyers.com
jhux@laborlawyers.com

Christopher Busey, Esq.
Amanda A. Sonneborn, Esq.
Seyfarth Shaw LLP
131 S. Dearborn St., Suite 2400
Chicago, IL 60603-5577
cbusey@seyfarth.com
asonneborn@seyfarth.com

Vi Applen, Esq.
Alfred De La Cruz, Esq.
Manning & Kass, Ellrod, Ramirez, Trester LLP
801 S. Figueroa St., 15th Floor
Los Angeles, CA 90017-5504
vna@manningllp.com
amd@manningllp.com

Jonathan Cohen, Esq.
Eli Naduris-Weissman, Esq.
Rothner, Segall & Greenstone
510 S. Marengo Ave.
Pasadena, CA 91101-3115
jcohen@rsglabor.com
enaduris-weissman@rsglabor.com

Andrew W. Gruber, Esq.
William J. Kishman, Esq.
Katherine G. Erdel, Esq.
Bingham Greenebaum Doll, LLP
2700 Market Tower
10 W. Market St.
Indianapolis, IN 46204
agruber@bgdlegal.com
wkishman@bgdlegal.com
kerdel@bgdlegal.com

Jeffrey A. Macey, Esq.
Macey, Swanson and Allman
445 N. Pennsylvania St., Suite 401
Indianapolis, IN 46204-1893
jmacey@maceylaw.com

George S. Howard Jr., Esq.
Mhairi L. Whitton, Esq.
Jones Day
12265 El Camino Real, Suite 300
San Diego, CA 92130
mwhitton@jonesday.com
gshoward@jonesday.com

Sean D. Graham, Esq.
Weinberg Roger & Rosenfeld
800 Wilshire Blvd., Suite 1320
Los Angeles, CA 90017-2623
sgraham@unioncounsel.net

Roger K. Crawford , Esq.
Best, Best & Krieger LLP
2855 E. Guasti Rd., Suite 400
Ontario, CA 91761
roger.crawford@bbklaw.com

Thomas O'Connell, Esq.
Best, Best & Krieger
3390 University Avenue, 5th floor
Riverside, CA 92501
thomas.oconnell@bbklaw.com

Aaron L. Agenbroad, Esq.
Jones Day
555 California St., 26th Floor
San Francisco, CA 94104
alagenbroad@jonesday.com

Judith Scott, Esq.
1130 Connecticut Avenue, N.W., Suite 950
Washington, DC 20036-3975
judy.scott@seiu.org

Michael J. Healey, Esq.
Healey & Hornack, P.C.
247 Fort Pitt Blvd., 4th Floor
Pittsburgh, PA 15222
mike@unionlawyers.net

Joseph A. Hirsch, Esq.
Hirsch & Hirsch
One Belmont Ave.
8th Floor, Suite 8001
Bala Cynwyd, PA 19004
jahirsch@hirschfirm.com

David P. Dean, Esq.
Kathy L. Krieger, Esq.
Ryan E. Griffin, Esq.
James & Hoffman, PC
1130 Connecticut Ave, NW, Suite 950
Washington, DC 20036
dpdean@jamhoff.com
klkrieger@jamhoff.com
regriffin@jamhoff.com

Deena Kobell, Esq.
National Labor Relations Board, Region 04
615 Chestnut Street, 7th floor
Philadelphia, PA 19106-4404
deena.kobell@nlrb.gov

Edward Castillo, Esq.
National Labor Relations Board, Region 13
209 South La Salle Street, Suite 900
Chicago, IL 60604-1443
edward.castillo@nlrb.gov

Richard McPalmer, Esq.
National Labor Relations Board, Region 20
901 Market Street, Suite 400
San Francisco, CA 94103
richard.mcpalmer@nlrb.gov

Fredric Roberson, Esq.
National Labor Relations Board, Region 25
575 N. Pennsylvania St. Suite, 238
Indianapolis, IN 46205-1520
fredric.roberson@nlrb.gov

John Rubin, Esq.
Rudy Fong-Sandoval, Esq.
National Labor Relations Board, Region 31
11500 W. Olympic Boulevard, Suite 600
Los Angeles, CA 90064
john.rubin@nlrb.gov
rudy.fong-sandoval@nlrb.gov

David Gribben
Alex Ortiz
Jamie Rucker
National Labor Relations Board, Region 2
26 Federal Plaza, Room 3614
New York, NY 10278
david.gribben@nlrb.gov
alejandro.ortiz@nlrb.gov
jamie.rucker@nlrb.gov

Dated: New York, New York
March 27, 2015

___/s/ David Gribben_____
David Gribben , Counsel for the General Counsel